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No. .....
IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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QUESTIONS PRESENTED.

1. May courts order discovery as to the hiring criteria for clergy of a religious body, its internal decisions concerning the performance of its clergy or its decision to terminate the employment of said clergy?

2. May the courts be used for settling internal grievances between parishioners and religious bodies?

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vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioners, Sinai Temple *et al.*, hereby respectfully pray that a writ of certiorari issue to the Court of Appeal of the State of California, Second Appellate District, to review that court's denial of Petitioners' petition for a writ of mandate directed to Respondent Court. The Supreme Court of California denied a petition for hearing in said court.*

*The petition for certiorari is properly directed to the Court of Appeal where that court's decision is denied review by the California Supreme Court. [See *Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951).]

OPINION BELOW.

The Court of Appeal opinion, ordered not for publication, is set forth in Appendix A hereto. The Supreme Court of California denied a Petition for Hearing and rendered no opinion. The Respondent Court, in its decision upon which the Petition for Writ of Mandate was based, rendered an unreported minute order which is set forth in Appendix B hereto.

JURISDICTION.

The decision of the Court of Appeal sought to be reviewed was filed March 12, 1982. A Petition for Hearing in the Supreme Court of California was filed on April 12, 1982. On May 20, 1982, that Court denied said Petition for Hearing with one justice voting in favor of granting a hearing.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

This Court's review by certiorari is sought on the ground that the decision of the Court of Appeal has determined substantial questions of federal law arising under the Freedom of Religion Clause of the First Amendment to the United States Constitution in a way in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED.

1. May courts order discovery as to the hiring criteria for clergy of a religious body, its internal decisions concerning the performance of its clergy or its decision to terminate the employment of said clergy?

2. May the courts be used for settling internal grievances between parishioners and religious bodies?

CONSTITUTIONAL PROVISION INVOLVED.

The Freedom of Religion Clause of the First Amendment to the United States Constitution. Printed in Appendix C hereto.

STATEMENT OF THE CASE.

A. The Proceedings in Respondent Court.

This Petition arises out of a discovery order directing disclosure of information concerning the hiring, supervision and termination of a rabbi by a Temple. Petitioner Sinai Temple, a nonprofit religious corporation, is a defendant in an action now pending in Respondent Court, entitled "*Dr. Marvin Smotrich v. Rabbi Hillel Silverman, etc.*", Case No. C352330. The defendants in that action also include, among others, Petitioner Mount Sinai Memorial Park, a division of Sinai Temple, and Petitioners William Friedland, Milton Siegel and Doris Siegel, who are alleged to be present or former officers or directors of Sinai Temple.[1] (Hereinafter Petitioners shall be collectively referred to as "SINAI TEMPLE".) Dr. Marvin Smotrich, the plaintiff in that action, which was filed on or about January 22, 1981, was named in the Petition below as Real Party in Interest ("Real Party").

On or about July 29, 1981, after Respondent Court had sustained Petitioners' demurrers to the original Complaint and a subsequent First Amended Complaint, Real Party filed and served his Second Amended Complaint in that action. In that Second Amended Complaint, Real Party alleges, *inter alia*, that he and his former wife were members of the

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[1]In the pleadings filed below by Real Party, Petitioner Mount Sinai Memorial Park is improperly alleged to be a nonprofit corporation rather than a division of SINAI TEMPLE and Petitioner Milton Siegel is improperly alleged to have been an officer and director of SINAI TEMPLE although he has never held either office.

congregation of SINAI TEMPLE between 1977 and 1980, that during that period of time Rabbi Hillel Silverman, who was then the Rabbi of SINAI TEMPLE, provided marriage counseling to him and to his wife, and that, during the course of that marriage counseling, Rabbi Silverman had an extramarital affair with Real Party's wife.

In the Second Amended Complaint, Real Party asserted eight causes of action against all defendants: Breach of Contract, Fraud, Negligence, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress, Negligent Employment, Constructive Fraud and Breach of Fiduciary Duty. On or about October 23, 1981, Respondent Court sustained SINAI TEMPLE's demurrer to all of those causes of action except the Third Cause of Action for Negligence and the Fourth Cause of Action for Negligent Infliction of Emotional Distress. On or about December 9, 1981, after Real Party failed to file a further amended complaint within the time specified by Respondent Court, SINAI TEMPLE filed its Answer to those two remaining causes of action.

In his Third Cause of Action, Real Party alleges, in substance, that SINAI TEMPLE, through Rabbi Silverman, provided marital counseling to congregation members and that SINAI TEMPLE was negligent in supervising the manner in which Rabbi Silverman purportedly provided marital counseling to him and to his wife. In the Fourth Cause of Action, Real Party alleges that he suffered humiliation and mental anguish as a result of the extramarital affair which Rabbi Silverman had with his wife during the course of that purported marital counseling.[2]

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[2]In point of fact, SINAI TEMPLE denies that it even offered marriage counseling to its members and that Rabbi Silverman ever provided such a service as part of his duties.

From the time of the filing of the original Complaint below, Real Party has sought to engage in substantial discovery. In that effort, Real Party took the depositions of SINAI TEMPLE's custodian of records and Dr. Edward Kaminer, a member of its Board of Directors; served a First Set of Requests for Admissions and Interrogatories on SINAI TEMPLE; and served a Second Set of Interrogatories on SINAI TEMPLE. Timely objection was made by SINAI TEMPLE to much of that discovery on a number of grounds, including the fact that it would infringe upon SINAI TEMPLE's religious freedom in violation of the First Amendment of the United States Constitution.

On or about June 1, 1981, Real Party filed and served a motion to compel SINAI TEMPLE to respond to approximately 75 deposition questions, requests for admissions and interrogatories to which SINAI TEMPLE had objected.

On August 19, 1981, after Respondent Court had twice previously continued the hearing on Real Party's motion, it again continued that hearing and directed counsel for SINAI TEMPLE and Real Party to file a joint statement. On December 9, 1981, after two additional continuances, Respondent Court ruled on Real Party's motion and ordered SINAI TEMPLE to answer 29 of the items to which objections had been asserted within 45 days (on or before January 24, 1981).

On or about January 6, 1982 SINAI TEMPLE served its Supplementary Answers to Certain of Plaintiff's Requests for Admissions and First and Second Set of Interrogatories, wherein SINAI TEMPLE answered nine of those 29 items. The Petition for Writ of Mandate below was directed only to the remaining four deposition questions, seven requests for admissions and nine interrogatories. These questions are set forth in Appendix D hereto. The Second Amended Complaint is set forth in Appendix E; the Answer to the Second

Amended Complaint is set forth in Appendix F hereto. Generally these questions, requests for admissions and interrogatories covered the topics of the Board of Directors' dealings with Rabbi Silverman, the Board's discussions of his work and the ultimate termination of his employment.

B. The Proceedings in the California Court of Appeal and the California Supreme Court.

Petitioners timely filed a Petition for Writ of Mandate in the Second Appellate District of the California Court of Appeal. The Court of Appeal issued an Order to Show Cause and stayed Respondent Court's order. After hearing on the petition, the Court on March 12, 1982 denied said petition, discharged the alternative writ and ordered Petitioners to comply with Respondent Court's order within ten (10) days. [Appendix A.]

A timely petition for hearing in the California Supreme Court was filed on April 12, 1982. On April 16, 1982 the Supreme Court stayed the order of Respondent Court pending final determination of the petition. Said petition was denied on May 20, 1982 with Justice Frank Newman voting in favor of granting the hearing.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The First Amendment to the United States Constitution strictly prohibits governmental interference in ecclesiastical matters. Historically this prohibition has encompassed both interference as to doctrinal issues and church administration. Both this Court and lower federal courts have dealt in some depth with this prohibition.

Respondent Court, by its order to comply with discovery, and the District Court of Appeal, by its denial of the petition below, have ignored this fundamental proposition. Both courts have implicitly held that decisions concerning the hiring of clergy and the subsequent supervision of that clergy are not protected under the Freedom of Religion Clause. Nothing could be closer to the core of the administration and operation of a religious body than questions as to its clergy. Review by way of certiorari is required in this Court for the transcendent reason that only such review can assure the fundamental right to worship without governmental intrusion.

I.

The Discovery Sought Is Barred by the First Amendment's Freedom of Religion Clause.

> "The First Amendment language that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .' historically has stood for the strict prohibition of governmental interference in ecclesiastical matters. Only on rare occasions where there existed a compelling governmental interest in the regulation of public health, safety, and general welfare have the courts ventured into this protected area. (Citations.)" [*Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).]

Each of the twenty items to which this Petition is addressed attempts to probe *directly* into the facts surrounding the initial hiring of a rabbi by a congregational governing body, its subsequent supervision of his activities and his ultimate resignation from the congregation. No area of inquiry into the administration and operation of a religious body could be more fundamentally prohibited by the protections guaranteed by the First Amendment, as the relevant case law makes unequivocally clear.

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 49 L.Ed.2d 151 (1976) involved the suspension and replacement of a bishop of the church. The Supreme Court of Illinois had ruled that the proceedings of the church with respect to the bishop were procedurally and substantially defective under the internal regulations of the church and therefore were arbitrary and invalid. This Court held that the lower court's inquiries into matters of ecclesiastical cognizance and policy and its actions pursuant thereto violated the First Amendment, stating:

> "For civil courts to analyze whether the ecclesiastical actions of a church are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . ." *Id.* at 713, 49 L.Ed.2d at 165.

The Court went on to quote *Watson v. Jones*, 13 Wall 679, 20 L.Ed. 666 (1872) for its conclusion that religious controversies are not the proper subject of civil court inquiry.

> "But is a very different thing where a subject-matter of dispute, strictly, and purely ecclesiastical in its character, — a matter over which the civil courts exercise

> no jurisdiction, — a matter which concerns theological controversy, *church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,* — becomes the subject of its action." 13 Wall at 733, 20 L.Ed. 666 (emphasis supplied).

This Court concluded that the First and Fourteenth Amendments permit religious organizations to establish their own rules and regulations for internal discipline and government, which are not subject to review by the courts.

In *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94, 97 L.Ed. 120 (1952) a dispute arose between two factions of the Russian Orthodox Church over title and control of a church building. This Court held that this issue was ecclesiastical and therefore not subject to review by the courts. The Court further stated that the freedom to select clergy was constitutionally protected. *Id.* at 116, 97 L.Ed. 136.

Gonzalez v. Archbishop, 280 U.S. 1, 74 L.Ed. 131 (1929) applied this principle of noninterference by the courts in a case involving a dispute over entitlement to certain income under a will that turned on an ecclesiastical determination of whether an individual would be appointed as a Catholic chaplain. The Court held that:

> "Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.* at 16, 74 L.Ed. 131.

The language in dicta suggesting a "fraud, collusion, or arbitrariness" exception was later repudiated, at least insofar as arbitrariness was concerned, in *Serbian Orthodox Diocese v. Milivojevich, supra.*

Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974), involved a claim by a minister that he had been fired by his church because of his promotion of racial integration within the community. Despite the minister's specific allegation that his termination had been for that impermissible purpose and, thus, itself violative of the Constitution, the Fifth Circuit unanimously affirmed the trial court's ruling that any inquiry into the reasons behind the church officials' decision to terminate the minister was barred by the First Amendment:

> "This case involves the fundamental question of who will preach from the pulpit of a church and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court . . . *Certainly a congregation's determination as to who shall preach from the church pulpit is at the very heart of the free exercise of religion* . . ." [*Id.* at 492 (emphasis added).]

Similarly, in *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255 (N.D. Tex. 1980), the District Court held that the EEOC was barred from inquiring into the hiring practices of a seminary. Although the court found that Congress had not intended to exempt religious organizations from jurisdiction under Title VII of the Civil Rights Act of 1964, it nevertheless held that any exercise of such jurisdiction to review the seminary's employment practices would violate the First Amendment. The court found not only that the Constitution prohibited any review of the seminary's choice of faculty

members and students but that it also applied to support personnel:

> "The risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious . . . A seminary's function within a particular religion is to replenish the core of the faithful . . .
>
> Application of the provisions of Title VII to any aspect of the employment relationship existing between the Seminary and its faculty and administrators, by virtue of their status as ministers, infringes upon the free exercise clause of the first amendment. (Citations.)" [*Id.* at 260.]

[*Accord, McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 34 L.Ed.2d 153 (1962) (Application of equal employment provisions of Civil Rights Act to Salvation Army would violate First Amendment).]

In view of those controlling principles, it is manifest that the attempted discovery to which this Petition is addressed is barred by the First Amendment. That inquiry is directed to discovery of the facts relating to SINAI TEMPLE's hiring of Rabbi Silverman, including whether any background investigations were performed; the manner and means by which SINAI TEMPLE's governing body, its Board of Directors, thereafter supervised and monitored his performance of his duties; and the facts surrounding his subsequent resignation. Such a probe directly involves the issue of "who will preach from the congregation's pulpit," and, consequently, falls squarely within the area of inquiry held impermissible by *Serbian Orthodox Diocese*, *Gonzalez*, *Southwestern Baptist Theological Seminary* and *Simpson*. As those courts recognized, compelling SINAI TEMPLE to respond to such inquiries would result in precisely the type of excessive governmental entanglement in religious

affairs which the Constitution prohibits. For that reason alone then, Petitioners respectfully submit, this Petition should be granted.

II.

The Judicial System May Not Be Used for the Purpose of Settling Internal Grievances Against Religious Bodies.

A quick perusal of Real Party's Complaint makes it abundantly clear that, while Real Party is imaginative, he has no claim against Petitioners. Real Party has invented a tort on the part of Petitioners of "negligent hiring" to circumvent the abolition of the tort of alienation of affections.

What Real Party actually complains of as to Petitioners is SINAI TEMPLE's methods of operation. But this is exactly the sort of inquiry which the courts may not make. *Serbian Orthodox Diocese, supra,* 426 U.S. 696, 713; *Kedroff, supra,* 344 U.S. 94, 116. Thus Respondent Court erred in ordering compliance with discovery.

III.

Conclusion.

Since the information requested is protected by the First Amendment, Petitioners respectfully submit that Respondent Court's order compelling them to answer the twenty items was unconstitutional and an abuse of its discretion,

and, therefore, that a hearing by this Court should be granted and that the proceedings below should be stayed pending hearing in this Court.

Respectfully submitted,

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